

ineffective. Accordingly, as stated above, we clarify that our exclusive jurisdiction over technical standards extends to determinations of whether particular wireless handsets comply with those standards, and expressly incorporate compliance determinations into our rules.

58. We conclude that unless we retain this degree of control over the administration of the technical standards we have promulgated under Section 710(c), our rules will likely cease to function as a standard, given the complexity of the technology involved and the special expertise necessary to test and evaluate whether a wireless phone complies with our HAC Act-based technical standards. If the States were to assume this role, we predict that the standards would be applied unevenly, which would disrupt the certainty and uniformity of regulation necessary to realize economies of scale in manufacturing and distribution, and to market phones on a nationwide basis.¹⁸⁶ Because our continued oversight of the technical standards is therefore an integral part of our ability to establish workable standards that serve the public interest, our performance of this evaluative function (*i.e.*, the continued oversight) constitutes an exercise of our mandate under Section 710(c) rather than Sections 710(a) or (b). Thus, the delegation requirement of Section 710(h) – which applies only to “specific regulations that the Commission issues under subsections (a) and (b)”¹⁸⁷ – does not require us to delegate this fact-finding function to the States. Accordingly, where a State chooses to adopt the Commission’s hearing aid compatibility rules, and hence, is delegated authority for enforcement pursuant to Section 710(h), the State shall refer to the Commission’s Office of Engineering and Technology any questions involving factual determinations of compliance with the standard. OET will render a determination in response to each request so that the State can properly carry out the State’s enforcement role, including interactions with the complainant and equipment supplier, and the determination of the appropriate remedy.

59. We recognize that CTIA and Verizon seek the Commission to go further, and to take enforcement matters entirely away from the states. We believe this argument is incompatible with the language of the HAC Act. As noted, the HAC Act states that “[t]he Commission shall delegate to each State commission the authority to enforce within such State compliance with the specific regulations that the Commission issues under subsections (a) and (b), conditioned upon the adoption and enforcement of such regulations by the State commission.”¹⁸⁸ No party has raised a compelling argument to counter this plain language, and we thus conclude that states that have adopted our rules and provide for enforcement continue to have enforcement authority. Moreover, we conclude that allowing states to make factual determinations incidental to enforcement other than those involving compliance with our technical rules – such as determining compliance with our labeling requirements, for example – do not run the same risk of undermining standards within exclusive Commission jurisdiction. Such determinations do not require specialized expertise, are not highly complex, and are unlikely to vary significantly from state to state. Accordingly, states that have adopted our rules and provide for enforcement may continue to make such determinations.

60. Finally, consistent with our affirmation that states may handle enforcement of the Commission’s hearing aid compatibility requirements where they have adopted our rules and provide for such enforcement, we affirm the Commission’s decision to apply the obligations and procedures applicable in the wireline telephone context (set forth in Part 68, Subpart E of our rules) to parties named in informal complaints involving hearing aid compatibility of digital wireless phones. The deadlines set forth in these rules ensure that these informal complaints will be addressed in an expeditious manner (by

¹⁸⁶ See *id.*

¹⁸⁷ 47 U.S.C. § 610(h).

¹⁸⁸ *Id.*

providing a thirty-day period during which time state personnel shall attempt to resolve the dispute),¹⁸⁹ and permit consumers or states to refer complaints to the Commission within six months where the state fails to act or has not adopted or incorporated the Commission's rules.¹⁹⁰ We continue to believe that the deadlines contained in the rules will ensure that states address informal complaints quickly and efficiently, and will create more certainty for consumers and wireless carriers.¹⁹¹

V. FURTHER NOTICE OF PROPOSED RULEMAKING

61. *Background.* In the *Order on Reconsideration*, above, we clarified that the live, in-store consumer testing requirement applies to all retail outlets owned or operated by wireless carriers or service providers.¹⁹² In addition, we clarified that the *de minimis* exception, which exempts from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer two or fewer digital wireless handset models, applies on a per air interface basis, rather than across an entire product line.¹⁹³ As set forth below, we seek comment on: (1) extending the live, in-store consumer testing requirement to retail outlets that are not directly owned or operated by wireless carriers or service providers, and (2) whether to narrow the *de minimis* exception.

A. Extending the Obligation to Provide Live, In-Store Consumer Testing

62. First, we seek comment on extending the live, in-store consumer testing requirement to retail outlets that are not directly owned or operated by wireless carriers or service providers. Although we clarified today that all retail outlets owned or operated by wireless carriers or service providers must make live, in-store consumer testing available, we are concerned that limiting this requirement to these retail outlets may prevent us from fully effectuating Congress' requirement that we "establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing."¹⁹⁴ Moreover, in its petition, CTIA asks the Commission to "clarify whether the [Commission] has legal authority and the scope of that authority to require retail stores to comply"¹⁹⁵ with the live, in-store testing requirement. Accordingly, we seek comment on this CTIA request. If we find that we have the authority explicitly to extend our hearing aid compatibility rules to independent retailers, should we do so?

63. We also seek comment on the impact that this proposal would have on small business retailers and independent retailers. Would extending this requirement create a more level playing field for different types of retailers? Or, would extending this requirement create an unacceptable burden for independent retailers, small business retailers, or both? For instance, will small business retailers have the physical space to fulfill this requirement? Do small business retailers have the sales volume to support implementation of this requirement? We encourage commenters to be specific as to the impact of this

¹⁸⁹ See 47 C.F.R. § 68.414 (stating that state procedures for enforcing hearing aid compatibility rules must provide a thirty-day period after a complaint is filed, "during which time state personnel shall attempt to resolve a dispute on an informal basis[']").

¹⁹⁰ See *id.* (stating that "[i]f the state has not adopted or incorporated" the Commission's rules, or "failed to act within six months from the filing of a complaint with the state public utility commission, the Commission will accept such complaints[']").

¹⁹¹ Cf. T-Mobile Comments at 7 (arguing that "an entirely different system" would potentially confuse customers and complicate matters for carriers).

¹⁹² See *supra* § IV.E.

¹⁹³ See *supra* § IV.H.

¹⁹⁴ 47 U.S.C. § 610(a).

¹⁹⁵ CTIA Petition at 12.

proposed modification.

64. We note that the relationship between independent retailers, whether large or small, and wireless carriers and service providers could have an impact on enforcement of a live, in-store consumer testing requirement. We further note that independent retailers act as agents for wireless carriers and service providers in selling wireless services. As Section 217 of the Communications Act explicitly makes carriers responsible for the acts, omissions, and failures of their agents, among others, we seek comment on the nature of any contract provisions that would require the retailers to provide live, in-store consumer testing.¹⁹⁶ Further, because Section 217 does not apply to service providers who are not carriers, we seek comment on, whether under provisions of general agency law and the HAC Act, we could require those service providers, in their contracts with retailers selling their wireless services, to require live, in-store consumer testing. We also seek comment on the extent to which carriers and service providers should be expected to monitor and enforce such contract provisions regarding this testing requirement.

65. Finally, we seek comment on how many small business and independent retailers have adopted the fourteen-day trial period for new services set forth in the CTIA Voluntary Consumer Information Code (CTIA Code). Which retailers are bound by the CTIA Code and offer a fourteen-day trial period? Are there major independent retailers that do not have a two week return policy? What percentage of carriers' service plans is purchased through independent retailers? Do manufacturers own any retail stores? If so, what percentage of manufacturers' handsets is purchased through an independent retailer? Are independent retailers currently preparing to comport with our hearing aid compatibility rules, specifically with our rules on the number of compliant handsets that must be offered for sale and our live, in-store consumer testing rules? Relatedly, we also seek comment on how parties envision consumers with hearing disabilities will be impacted in instances where independent retailers do not provide live, in-store testing or a thirty-day trial period, which the Commission encourages. If some independent retailers do not engage in practices that comport with our hearing aid compatibility rules, how will this present problems for hearing-impaired consumers? For instance, do parties foresee instances where independent retailers would claim that certain wireless phone models are compliant yet would not allow consumers to return handsets if hearing aid compatibility-related problems arose? Have there already been instances where independent retailers have claimed that certain phone models were hearing aid-compatible but refused to allow consumers to return handsets if hearing aid compatibility-related problems arose? We have determined that the ability to return handsets that do not comply with our rules is not a substitute for an in-store testing requirement for stores owned or operated by wireless carriers or service providers. What characteristics or independent retailers would support a different determination for the application of the in-store testing requirement in their case? Would returning wireless phones that present hearing aid compatibility-related problems be more difficult when handsets are purchased from an independent retailer or a small business retailer? We intend to follow these developments closely after the September 16, 2005, handset deployment date. As noted earlier, we believe that persons with hearing disabilities must have a meaningful opportunity and sufficient time to identify and become familiar with digital wireless phones.

B. Narrowing the *De Minimis* Exception

66. Second, we seek comment on whether to narrow the *de minimis* exception so as to exempt from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer one digital wireless handset model per air interface, or whether we should narrow

¹⁹⁶ See 47 U.S.C. § 217.

the *de minimis* exception in some other way.¹⁹⁷ Specifically, we seek comment on whether the current rule reduces the ability of consumers with hearing aids and cochlear implants to have access to wireless devices.¹⁹⁸ We seek comment on whether any particular modification that would narrow the *de minimis* exception would increase costs to all consumers, including those with and without hearing disabilities, or discourage market entry by manufacturers.¹⁹⁹ We seek comment on the number of wireless carriers, service providers and manufacturers that would be affected by any such change in the rule, including the impact on small businesses. We encourage commenters to be specific and to provide empirical evidence as to the impact of narrowing the *de minimis* exception.

VI. CONCLUSION

67. In this *Order on Reconsideration*, we affirm the Commission's decision to adopt the ANSI C63.19 technical standard as an established technical standard and reiterate the Commission's ongoing commitment to expeditiously review final updated versions of the standard either on our own motion or upon request. We also affirm the Commission's authority to establish the preliminary handset deployment benchmark specific to Tier I wireless carriers, and we modify the requirement in order to provide greater certainty while not adversely affecting hearing impaired individuals' access to compatible phones. In addition, we affirm the handset labeling and live, in-store consumer testing framework, as well as the compliance reporting obligation. We modify with conditions the preliminary handset deployment obligation for digital wireless carriers employing TDMA technology, given our recognition that the TDMA air interface has become increasingly obsolete. We clarify that the *de minimis* exception applies on a per air interface basis. We also clarify that the Commission retains exclusive jurisdiction over the technical standards for hearing aid compatibility. In this *Further Notice of Proposed Rulemaking*, we seek comment on: (1) extending the live, in-store consumer testing requirement to retail outlets that are not directly owned or operated by wireless carriers or service providers, and (2) whether to narrow the *de minimis* exception so as to exempt from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer one digital wireless handset model per air interface, as well as other potential ways to narrow the *de minimis* exception. Our actions today further Congress' goal of ensuring access to telecommunications services by individuals with hearing disabilities and are critical in light of the rising importance of wireless communication.

VII. PROCEDURAL MATTERS

A. Comment Filing Procedures

68. *Comments and reply comments.* Pursuant to the applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,²⁰⁰ interested parties may file comments in response to the *Further Notice of Proposed Rulemaking* on or before 60 days after publication in the Federal Register, and reply comments on or before 90 days after publication in the Federal Register. **All filings related to this Order on Reconsideration and Notice of Proposed Rulemaking should refer to WT Docket No. 01-309.**

¹⁹⁷ For example, SHHH requests that we should require a manufacturer that has only one handset in any particular interface to make the phone compliant with our hearing aid compatibility requirements. See SHHH Comments at 7. We note that although a number of parties expressed general support for the SHHH comments, these parties did not expressly comment on or endorse the SHHH proposal. See, e.g., IHS Comments at 1; ALDA Comments at 1. Further, only RIM expressly commented on this proposal. See RIM Reply Comments at 1; see *supra* n.173.

¹⁹⁸ See SHHH Comments at 7-8.

¹⁹⁹ See RIM Petition at 2.

²⁰⁰ See 47 C.F.R. §§ 1.415, 1.419.

Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

69. *Availability of documents.* The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D. C. 20554, and on the Commission's Internet Home Page: <<http://www.fcc.gov>>. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc. (BCPI), Portals II, 445

12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail at the following e-mail address: <WWW.BCPIWEB.COM>. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at <bmillin@fcc.gov>.

B. *Ex Parte* Presentations

70. The *Further Notice of Proposed Rulemaking* is a permit-but-disclose rulemaking proceeding, subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.²⁰¹ *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's Rules.²⁰²

C. Regulatory Flexibility Act

71. The Regulatory Flexibility Act of 1980, as amended (RFA),²⁰³ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."²⁰⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁰⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²⁰⁶ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²⁰⁷

72. *Final Regulatory Flexibility Certification*. As required by the RFA,²⁰⁸ the Commission has prepared a Final Regulatory Flexibility Certification of the possible impact on small entities of the proposals in the *Order on Reconsideration*. In this proceeding the Commission acts to ensure that every American has access to the benefits of digital wireless telecommunications, including individuals with hearing disabilities. The Commission grants in part and denies in part petitions for reconsideration of the *Hearing Aid Compatibility Order*, which lifted the blanket exemption for digital wireless telephones under the HAC Act.

²⁰¹ See 47 C.F.R. § 1.1206(b)(2).

²⁰² See generally *id.* at §§ 1.1202, 1.1203, 1.1206.

²⁰³ The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁰⁴ 5 U.S.C. § 605(b).

²⁰⁵ *Id.* at § 601(6).

²⁰⁶ *Id.* at § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²⁰⁷ 15 U.S.C. § 632.

²⁰⁸ See 5 U.S.C. § 603. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). See *id.* at §§ 601-612.

73. Pursuant to the RFA,²⁰⁹ a Final Regulatory Flexibility Analysis (FRFA) was incorporated into the *Hearing Aid Compatibility Notice*.²¹⁰ The instant *Order on Reconsideration* modifies Section 20.19(c) of the Commission's rules on hearing aid compatible mobile handsets in response to a petition from wireless carriers operating TDMA networks and overbuilding them to employ alternative air interfaces. These carriers will be considered compliant with the September 16, 2005, preliminary handset deployment benchmark if they: (1) offer two hearing aid-compatible handset models to customers that receive service from the overbuilt (i.e., non-TDMA) portion of the network, (2) are overbuilding (i.e., replacing) their entire network, and (3) complete the overbuild by September 18, 2006. Therefore, because we find the action taken in the instant *Order on Reconsideration* amounts to an exception and maintains the status quo for affected entities for a period of approximately one year, and that any impact overall is positive, we certify that the action described will not result in a significant economic impact on a substantial number of small entities.

74. In addition, we certify that our decision to modify the preliminary handset deployment benchmark for Tier I wireless carriers will not have a significant economic impact on a substantial number of small entities. Tier I wireless carriers are not small.

75. The Commission will send a copy of the *Order on Reconsideration*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.²¹¹ In addition, the *Order on Reconsideration* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.²¹²

76. *Initial Regulatory Flexibility Analysis*. As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the instant *Further Notice of Proposed Rulemaking*.²¹³ The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further Notice of Proposed Rulemaking*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Further Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²¹⁴

D. Paperwork Reduction Analysis

77. The *Order on Reconsideration* does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506 (c)(4).

78. Likewise, the *Further Notice of Proposed Rulemaking* does not contain proposed information collection (s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any proposed "information collection burden for small business concerns

²⁰⁹ See *id.* at § 603. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). See *id.* at §§ 601-612.

²¹⁰ See *Hearing Aid Compatibility Order*, 18 FCC Rcd at 16795.

²¹¹ See 5 U.S.C. § 801(a)(1)(A).

²¹² See *id.* at § 605(b).

²¹³ See generally 5 U.S.C. § 603.

²¹⁴ *Id.*

with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506 (c)(4).

VIII. ORDERING CLAUSES

79. IT IS ORDERED that, pursuant to the authority of sections 1, 4(i), 7, 10, 201, 202, 208, 214, 301, 302, 303, 308, 309(j), 310, and 710 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 157, 160, 201, 202, 208, 214, 301, 302, 303, 308, 309(j), 310, and 610, this *Order on Reconsideration and Further Notice of Proposed Rulemaking* IS HEREBY ADOPTED

80. IT IS FURTHER ORDERED that Part 20 of the Commission's rules, 47 C.F.R. Part 20, is AMENDED as specified in Appendix B, effective 30 days after publication of the *Order on Reconsideration* in the Federal Register.

81. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on the *Further Notice of Proposed Rulemaking* on or before 60 days after publication of the *Further Notice of Proposed Rulemaking* in the Federal Register and reply comments on or before 90 days after publication in the Federal Register.

82. IT IS FURTHER ORDERED that the petition for reconsideration of the *Hearing Aid Compatibility Order* filed by the Cellular Telecommunications and Internet Association IS GRANTED IN PART AND DENIED IN PART to the extent set forth herein.

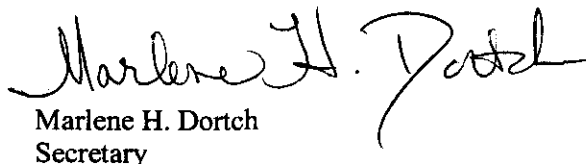
83. IT IS FURTHER ORDERED that the petition for reconsideration of the *Hearing Aid Compatibility Order* filed by Verizon Wireless IS GRANTED IN PART AND DENIED IN PART to the extent set forth herein.

84. IT IS FURTHER ORDERED that the petition for reconsideration of the *Hearing Aid Compatibility Order* filed by Research in Motion Limited IS GRANTED to the extent set forth herein.

85. IT IS FURTHER ORDERED that the petition for reconsideration of the *Hearing Aid Compatibility Order* filed by the TDMA Carriers (Public Service Cellular Inc., Missouri RSA No.7 Limited Partnership dba Mid Missouri Cellular; Minnesota Southern Wireless Company dba Hickory Tech, Northwest Missouri Cellular Limited Partnership, Illinois Valley Cellular RSA 2-I Limited Partnership, Illinois Valley Cellular 2-II Limited Partnership and Illinois Valley RSA 2-III Limited Partnership) and Rural Telecommunications Group and IS GRANTED IN PART to the extent set forth herein.

86. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the *Order on Reconsideration and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Certification and the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A**PARTIES****Parties Filing Petitions (4)**

<u>Name of Party</u>	<u>Abbreviation</u>
Cellular Telecommunications and Internet Association	CTIA
Research in Motion Limited	RIM
TDMA Carriers and the Rural Telecommunications Group (joint)	TDMA Carriers and RTG
Verizon Wireless	Verizon

Parties Filing Comments As of June 2, 2005 (83)

<u>Name of Party</u>	<u>Abbreviation</u>
Alan J. Brown	
Algene Ott Mendiola	
American National Standards Institute Accredited Standards Committee C63 (EMC) Subcommittee 8 (Medical Devices)	ANSI
Andrew B. Finlayson	
Angela Wieker	
Anne Pope	
Arlene Romoff	
Association of Late-Deafened Adults, Inc.	ALDA
Barbara Bryan	
Barbara S. Dagen	
BJ Hoffstadt	
Carol Burns	
Carrie Welter	
Cathy A. Sanders	

Charles J. Kantor

Clark O. Anderson

Dana L. Simon

Daniel J. Sheridan

David S. Viers

Dawn Hayes

Debbie Mohnney

Diana Bender

Don Pickens

Don Senger

Donald J. Ray

Electone, Inc.

Esther Snively

Frances J Bawden

George De Vilbiss

Harvey David Branfield

Hearing Industries Association

Helen Drosak

Henry Dozier

Horst Arndt

International Hearing Society

IHS

Jeffrey Winick and Wendy Samuelson

Joan De Graaff

Joan Haber

John Klein

Judy Ginsburg

Julia M. Olson

Julie Springer

Karen Frohib

Kathy Patrick

Lawrence T. Hagen/Micro-Tech Hearing Instruments

Lillian Trussell

Linda Day

Lois Itchkawitz

Louis T. Gnecco and Paula Gnecco/Better Hearing, Inc. and Tempest, Inc.

Lynn Toschi

Malisa W. Janes, RH.D.

Marcia M. Finisdore

Marilyn Voorhies

Martha Meyer

Mary Amorello

Mary Jo Russell

Mary Mitchell

Mary Shannon

Michael Eckert

Nancy Dietrich

Nellie Rader

Norma Bauer

Pamela Foody

Patrick Nagle

Paul Darkes

Paul E. Hammerschlag, MD, FACS

Priscilla Bade, MD

Qualitone Hearing Instruments

Rachel Joy

Raegene Castle

Roberta Schiffer

Ronda Kiser

Rural Cellular Association

RCA

Ruth D. Bernstein

Sara B. Wilson

Self Help for Hard of Hearing People

SHHH

Shelene Chang

Sprint Corporation on behalf of Spectrum L.P., d/b/a Sprint PCS

Sprint

Terry LaBarbera

T-Mobile USA, Inc.

T-Mobile

Tommy Wells

Tom Victorian

Zachary A. Hammock/Omni Hearing Systems

Parties Filing Reply Comments (4)

Name of Party

Abbreviation

Cingular Wireless LLC

Cingular

CTIA

RIM

RTG

APPENDIX B**FINAL RULES**

For the reasons discussed above, the Federal Communications Commission amends title 47 of the Code of Federal Regulations, Part 20, as follows:

PART 20 – COMMERCIAL MOBILE RADIO SERVICES**§ 20.19 Hearing aid-compatible mobile handsets.**

* * * * *

1. Amend § 20.19 by revising paragraph (b) to add subsection (4) as follows:

- (4) All factual questions of whether a wireless phone meets the technical standard of this subsection shall be referred for resolution to Chief, Office of Engineering and Technology, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

* * * * *

2. Amend § 20.19 by revising paragraph (c)(2) to read as follows:

- (2) And each provider of public mobile radio services must:
 - (i) (A) Include in its handset offerings at least two handset models per air interface that comply with § 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store; or (B) In the event a provider of public mobile radio services is using a TDMA air interface and plans to overbuild (*i.e.*, replace) its network to employ alternative air interface(s), it must: (1) offer two handset models that comply with § 20.19(b)(1) by September 16, 2005, to its customers that receive service from the overbuilt (*i.e.*, non-TDMA) portion of its network, and make available in each retail store it owns or operates all of these handset models for consumers to test in the store, (2) overbuild (*i.e.*, replace) its entire network to employ alternative air interface(s), and (3) complete the overbuild by September 18, 2006; and
 - (ii) Ensure that at least 50 percent of its handset models for each air interface comply with § 20.19(b)(1) by February 18, 2008, calculated based on the total number of unique digital wireless handset models the carrier offers nationwide.

* * * * *

3. Amend § 20.19 by revising paragraph (c)(3)(i) to read as follows:

- (3) Each Tier I carrier must:

- (i) (A) Include in its handset offerings four digital wireless handset models per air interface or twenty-five percent of the total number of digital wireless handset models offered by the carrier nationwide (calculated based on the total number of unique digital wireless handset models the carrier offers nationwide) per air interface that comply with § 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the carrier all of these handset models for consumers to test in the store; and (B) Include in its handset offerings five digital wireless handset models per air interface or twenty-five percent of the total number of digital wireless handset models offered by the carrier nationwide (calculated based on the total number of unique digital wireless handset models the carrier offers nationwide) per air interface that comply with § 20.19(b)(1) by September 16, 2006, and make available in each retail store owned or operated by the carrier all of these handset models for consumers to test in the store; and

* * * * *

APPENDIX C

INITIAL REGULATORY FLEXIBILITY ANALYSIS
(Further Notice of Proposed Rulemaking)

As required by the Regulatory Flexibility Act (RFA),²¹⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Further Notice of Proposed Rule Making (FNPRM)*. Written public comments are requested regarding this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FNPRM* provided in paragraph 77. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²¹⁶ In addition, the *Further Notice of Proposed Rulemaking* and IRFA (or summaries thereof) will be published in the Federal Register.²¹⁷

A. Need for, and Objectives of, the Proposed Rules

In the *Order on Reconsideration*, above, we clarified that the live, in-store consumer testing requirement applies to all carrier-owned and operated retail outlets.²¹⁸ In addition, we clarified that the *de minimis* exception, which exempts from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer two or fewer digital wireless handset models, applies on a per air interface basis, rather than across an entire product line.²¹⁹

In the *Further Notice of Proposed Rulemaking* we seek comment on:

- Extending the live, in-store consumer testing requirement to retail outlets that are not directly owned or operated by wireless carriers or service providers; and
- Whether to narrow the *de minimis* exception so as to exempt from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer one digital wireless handset model per air interface, as well as other potential ways to narrow the *de minimis* exception.

B. Legal Basis

Authority for issuance of this item is contained in Sections 1, 4(i), 7, 10, 201, 202, 208, 214, 301, 302, 303, 308, 309(j), 310, and 710 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 157, 160, 201, 202, 208, 214, 301, 302, 303, 308, 309(j), 310, and 610.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the

²¹⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²¹⁶ See 5 U.S.C. § 603(a).

²¹⁷ See *id.*

²¹⁸ See *supra* § IV.E.

²¹⁹ See *supra* § IV.H.

number of small entities that may be affected by the proposed rules if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²²⁰ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²²¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²²² As of the year 2002, according to SBA data, there were approximately 22.4 million small businesses nationwide.²²³

Neither the Commission nor the SBA has developed specific definitions for small providers of the industries affected. Therefore, throughout our analysis, unless otherwise indicated, the Commission uses the applicable generic definitions under the SBA rules, and the North American Industry Classification System (NAICS) categories. In addition, to facilitate our analysis, we utilize the Commission's report, *Trends in Telephone Service (Trends)*, published annually by the Commission's Wireline Competition Bureau.²²⁴ Below, we further describe and estimate the number of small entities that may be affected by the proposed rules, if adopted.

Cellular and Other Wireless Telecommunications, and Paging. The SBA has developed a size standard for wireless small businesses within the two separate categories of Cellular and Other Wireless Telecommunications, and Paging. Under that standard, such a business is small if it has 1,500 or fewer employees.²²⁵ According to the FCC's *Telephone Trends Report* data, 975 companies reported that they were engaged in the provision of wireless service.²²⁶ Of these 975 companies, an estimated 767 have 1,500 or fewer employees and 208 have more than 1,500 employees. Consequently, we estimate that a majority of small wireless service providers may be affected by the proposed rules, if adopted.

Wireless Communications Equipment Manufacturers. The SBA has established a small business size standard for wireless communications equipment manufacturing. Under the standard, firms are considered small if they have 750 or fewer employees.²²⁷ Census Bureau data for 1997 indicates that, for that year, there were a total of 1,215 establishments²²⁸ in this category.²²⁹ Of those, there were 1,150 that

²²⁰ See 5 U.S.C. § 601(6).

²²¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.

²²² Small Business Act, 5 U.S.C. § 632 (1996).

²²³ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

²²⁴ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3, page 5-5 (May 2004). This source uses data that are current as of October 22, 2003.

²²⁵ 13 C.F.R. § 121.201, NAICS codes 517211 and 517212.

²²⁶ *Telephone Trends Report*, Table 5.3.

²²⁷ 13 C.F.R. § 121.201, NAICS code 334220.

²²⁸ The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may (continued....)

had employment under 500, and an additional 37 that had employment of 500 to 999. The Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

Radio, Television, and Other Electronics Stores. "This U.S. industry comprises: (1) establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services."²³⁰ The SBA has developed a small business size standard for this category of retail store; that size standard is \$7.5 or less in annual revenues.²³¹ According to Census Bureau data for 1997, there were 8,328 firms in this category that operated for the entire year.²³² Of these, 8,088 firms had annual sales of under \$5 million, and an additional 132 had annual sales of \$5 million to \$9,999,999. Therefore, the majority of these businesses may be considered to be small.²³³

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

The *FNPRM* seeks comment on two of the Commission's existing hearing aid compatibility rules. First, all retail outlets owned or operated by wireless carriers or service providers must make live, in-store consumer testing available at this time.²³⁴ The Commission is seeking comment on extending this requirement to additional retail outlets. Second, the *de minimis* exception currently exempts from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer two or fewer digital wireless handset models, and applies on a per air interface basis. The Commission is seeking comment on narrowing the *de minimis* exception so as to exempt from the hearing aid compatibility requirements wireless carriers, service providers and handset manufacturers that offer one digital wireless handset model per air interface, as well as other potential ways to narrow the *de minimis* exception.

The proposals set forth in the *FNPRM* do not entail reporting, recordkeeping, and/or third-party consultation. The *FNPRM* seeks comment on two of the Commission's existing hearing aid compatibility rules.

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be owned by a different establishment. Thus, the number given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census break-out data for firms or companies only gives the total number of such entities for 1997, which was 1,089.

²²⁹ U.S. Census Bureau, 1997 *Economic Census*, Industry Series: Manufacturing, "Industry Statistics by Employment Size," Table 4, NAICS code 334220 (issued August 1999).

²³⁰ U.S. Census Bureau, "2002 NAICS Definitions: 443112 Radio, Television, and Other Electronics Stores," www.census.gov (last modified on May 5, 2003).

²³¹ 13 C.F.R. § 121.201, NAICS code 443112.

²³² U.S. Census Bureau, 1997 *Economic Census*, Subject Series: Retail Trade, "Radio, Television, and other Electronics Stores," Table 4, NAICS code 443112 (issued Oct. 2000). These data indicate the estimated annual "sales size" for the firms.

²³³ *Id.*

²³⁴ See *Order on Reconsideration* at § IV.E.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²³⁵

The *FNPRM* seeks comment on two of the Commission's hearing aid compatibility rules and could impact small entities. As noted in the *Hearing Aid Compatibility Order*, however, the critical nature of hearing aid compatibility with wireless phones limits the Commission's ability to provide small wireless carriers, service providers and handset manufacturers with a substantially less burdensome set of regulations than that placed on larger entities.²³⁶ Nonetheless, as set forth in the *Order on Reconsideration and FNPRM*, the Commission continues to recognize that certain manufacturers and service providers, which may have only a small presence in the market, may be impacted by any future actions. We specifically seek comment on alternatives that might lessen any adverse economic impact on small entities, while fulfilling the goals of this proceeding.

F. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules

None.

²³⁵ 5 U.S.C. § 603(c).

²³⁶ See *Hearing Aid Compatibility Order*, App. B., 18 FCC Rcd at 16798 ¶ 11.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones,
Order on Reconsideration and Further Notice of Proposed Rulemaking, WT Docket No. 01-309*

This Order reaffirms and clarifies our implementation of Congress's important goal of ensuring access to telecommunications services for individuals with hearing disabilities. Our action reiterates the Commission's commitment to making sure members of the hearing-impaired community are able to take full advantage of the potential for digital wireless technologies to improve lives and promote safety. I also am encouraged by the collaborative efforts by wireless phone manufacturers, service providers, and the hearing aid community to carry out this public interest goal and to make it a reality.

I would sound a note of caution about today's further notice, however. In it, the Commission seeks comment on extending the in-store consumer testing requirement to retail stores that are not owned or operated directly by wireless carriers. While I continue to support testing requirements in connection with the carriers' own retail sales and urge independent retailers to do the same, I believe we should be circumspect about any attempt to extend well beyond our traditional jurisdiction to compel action by independent retailers without a clear directive from Congress to do so. I have been a strong proponent of improving access for consumers with hearing disabilities and I continue to support strict enforcement of our existing rules, but we should not propose rules that we may well lack authority to adopt and, in any case, probably cannot enforce. The Commission should proceed very cautiously in this inquiry.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Order on Reconsideration and Further Notice of Proposed Rulemaking (WT Docket No. 01-309).*

I'm happy to support today's Order, which largely maintains our hearing aid compatibility rules as they apply to wireless phones and clarifies the Commission's continuing commitment to ensure access to digital wireless services by individuals with hearing loss. Strong and clear rules here are critical to accomplishing the statutory goal of ensuring that our Nation's telecommunications networks are accessible to Americans with hearing loss. We heard from consumers across the country about the importance of one of our rules in particular, the rule that requires retailers to make in-store testing of hearing aid compatible phones available upon request. We wisely decide to maintain this rule today, and explore whether we should extend it to retailers that are not owned or operated by wireless carriers.

We also alter our rules on the number of hearing aid compatible handsets that must be made available to customers. This change is the result of discussions between Self Help for the Hard of Hearing and CTIA. I'm hopeful that our new arrangement will benefit both consumers and carriers. I'd like to commend Brenda Battat of SHHH and Steve Largent of CTIA for the commitment their organizations have shown to working together. I've long advocated closer and more regular exchanges between advocates for Americans with disabilities and the communications industry; I'm glad these discussions appear to be bearing fruit; and I look forward to their continuation to ensure that the changes we make today lead to better access and bring no unintended consequence. I also look forward to the broadening of these kinds of discussions to other issues of mutual interest.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones;
Order on Reconsideration and Further Notice of Proposed Rulemaking;
WT Docket No. 01-309*

I am very pleased to support today's decision because it reaffirms our strong commitment to improving access to digital mobile wireless phones by those Americans who use hearing aids.

Over the past couple of years, I have talked a lot about what the public interest means to me as an FCC commissioner – about how I have been guided in making decisions by one key principle: that the public interest means securing access to communications for everyone, including those the market may leave behind.

Whether it's in the field of broadcasting, spectrum-based services, or competitive telecommunications services, I have tried to address this goal by providing for access by non-English speakers, people with disabilities, rural and low-income consumers, small businesses, and many others. Public interest issues, such as protecting the rights of people who use hearing aids, always should remain in the forefront of our decisions.

While the Hearing Aid Compatibility (HAC) Act of 1988 exempted mobile wireless phones from hearing aid compatibility, Congress specifically entrusted this Commission with assessing the appropriateness of continuing the exemption. Soon after I joined the Commission, we took that obligation to heart and modified the exemption as it then applied to digital mobile wireless phones. Today, we rightly affirm the large majority of that decision.

However, we do make one significant change to our rules by allowing Tier I carriers the option of making available four digital wireless handset models per air interface to satisfy the September 16, 2005 initial benchmark. This option, which is supported by consumer groups, will provide carriers with a level of certainty that should greatly facilitate the management of their supply chain.

It must be highlighted that in advocating for this change, CTIA reports this increased certainty would enable Tier I members to provide HAC information on "call-out cards" that are a part of the handset display in retail stores. The Tier I carriers also would agree to provide low-end and high-end HAC-complaint handsets. I very much support this mutually agreeable solution. I applaud CTIA's commitment and look forward to the timely implementation of these additional consumer benefits.

I am also encouraged by the progress in hearing aid compatibility that's been made since our earlier decision. The American National Standards Institute (ANSI) committee working on this issue recently adopted and released a draft version of an updated hearing aid compatibility standard. And we are hearing good reports about the level of cooperation between service providers, handset manufacturers, and representatives of the hard of hearing community in working towards upcoming compliance deadlines.

Finally, we pose important questions about two aspects of our rules relating to expanding our in-store testing requirements to more outlets and the scope of our *de minimis* exception. These issues came up during the reconsideration discussion, and I am glad that we have teed them up for further comment. We want to make sure we have a full record before considering whether or not to further address these issues.